A

PGC GOLF MANAGEMENT SDN BHD

v.

SARAWAK STADIUM CORPORATION

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[SUIT NO: 22-33-1998-III (I)]
29 JUNE 2006

C ***LANDLORD & TENANT:*** *Breach - Tenancy agreement - Allegation of - Repossession of land prior to expiration - Whether plaintiff suffered damages - Whether no compensation payable to plaintiff - Whether plaintiff liable for outstanding sums*

D ***LANDLORD & TENANT:*** *Agreement - Tenancy agreement - Interpretation - Inequity of situation - Whether considered - Whether no compensation payable to plaintiff - Whether plaintiff liable for outstanding rentals*

E ***CIVIL PROCEDURE:*** *Pleadings - Implied term in tenancy agreement - Issue not pleaded - Whether a complete departure from pleaded case - Whether made in good faith - Whether parties bound by pleadings*

The proceedings arise out of a claim by the plaintiff, PGC Golf Management Sdn Bhd, for damages arising from an alleged breach F of a tenancy agreement ('tenancy agreement') in respect of land at Siol Batu, Kuching, Sarawak, containing an area of 11.347 hectares ('the land') by the defendant. The alleged breach was related to the defendant repossessing the land prior to the expiration of the three month period provided for under cl. 5 of G the tenancy agreement. The defendant denied such breach and further made a counterclaim of RM23,081.06 being outstanding rentals and water consumed by the plaintiff which had been paid by the defendant. The undisputed facts were that the defendant had the beneficial interest to the land which contained a driving H range operated by Awang Kamarudin Awang Mohammad, trading under the style and firm name of Petra Golf Centre. Around September 1997, the plaintiff had defaulted in its payments of rental for a number of months. As a result, the defendant issued a letter informing the plaintiff that it was in arrears of four months I rental and gave the plaintiff a three month written notice to

deliver vacant possession of the said land to the defendant. The plaintiff ceased operations and vacated the said land on 31 October 1997. On 1 November 1997, the defendant took possession of the land. The issues that arose were (1) whether the plaintiff had suffered any damages as a result of the defendant taking possession of the land; (2) whether there was an implied term in the tenancy agreement that plaintiff was entitled to remove the trade fixtures; (3) whether no compensation was payable to the plaintiff and (4) whether plaintiff liable for outstanding rentals.

Held (dismissing plaintiff's claim):

(1) As for the breach of cl. 5, it was of no relevance as it was the plaintiff itself who ceased operations and vacated the said land. The allegation that the plaintiff was prevented from removing the fixtures was again irrelevant as its right to remove the fixtures depended on the interpretation of the tenancy agreement. In any event the plaintiff had not suffered any damages as a result of the defendant taking possession of the land. (para 14)

(2) Parties are bound by their pleadings and courts will not decide on matters which had not been pleaded. What had not been pleaded here was that there was an implied term in the tenancy agreement that the plaintiff was entitled to remove the fixtures when the tenancy agreement was terminated under cl. 5. It was a complete departure from the pleaded case and was not made in good faith. The plaintiff's attempt to say that the tenancy agreement was a lease coupled with an interest was improper. (para 15)

(3) In interpreting any contract, the court must look at the words used within the four corners of the agreement to ascertain the intentions of the parties and must interpret the clause in the context of the whole agreement. Herein, looking at the tenancy agreement as a whole, one could easily ascertain that the parties had thought about the inequity of a situation if the tenancy agreement were terminated prior to the expiration of the seven years period in view of the heavy investment by the plaintiff. Where however if the plaintiff failed to comply with the terms of the tenancy agreement by failing to pay the rentals, cl. 5 provided that the defendant could terminate it

and upon termination the plaintiff was obliged to return the land forthwith. No compensation was payable to the plaintiff simply because it was in default. (para 16)

(4) From the evidence there appeared to be no real challenge by the plaintiff on its liability for those outstanding rentals and the water bill. The proof of the amount of RM23,081.06 had not been shaken by cross examination. In respect of the defendant's counterclaim, this court entered judgment for the defendant in the said sum with interest under s. 11 of the Civil Law Act. (paras 17, 26 & 27)

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1999] 6 CLJ 487 HC ***(refd)***

Commercial Bank of Australia v. Amadio [1983] 151 CLR 447 ***(refd)***

Mulpha Pacific Sdn Bhd v. Paramount Corp Sdn Bhd [2003] 4 CLJ 294 CA ***(refd)***

Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11

For the plaintiff - Mohamad Ivan Hussein; M/s Ivan Hussein
For the defendant - Tan Thiam Teck; M/s Reddi & Co

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JC:

The Proceedings

[1] The proceedings arise out of a claim by the plaintiff, PGC Golf Management Sdn. Bhd. for damages arising from an alleged breach of a tenancy agreement dated 5 July 1994 (tenancy agreement) in respect of land at Siol Batu, Kuching, Sarawak containing an area of 11.347 hectares, more or less and described as Lots 1598 and 2693, Block 18, Salak Land District (land) by the defendant. The alleged breach relates to the defendant repossessing the land prior to the expiration of the three month

period provided for under cl. 5 of the tenancy agreement. The defendant denies such breach and further made a counterclaim of RM23,081.06 being outstanding rentals for part of the month of October 1996, the months of November, December 1996 and June, July, August, September and October 1997 and water consumed by the plaintiff which had been paid by the defendant.

Undisputed Facts

[2] The defendant has the beneficial interest to the land which contains a driving range operated by Awang Kamarudin Awang Mohammad, trading under the style and firm name of Petra Golf Centre.

[3] By a letter dated 29 July 1993 (exh. A – pp. 2-3, also exhibited as RZ1 in PW1A), Petra Golf Centre wrote to the defendant to inform that it planned to construct 9 greens and tee boxes on the land and requested from the defendant a minimum of ten years tenancy in light of the expenditure to be incurred in constructing the 9 greens and tee boxes.

[4] The defendant by a letter dated 12 January 1994 (exh. A – pp. 5-6, also exhibited as RZ2 in PW1A), informed the plaintiff that it was agreeable to its proposal to build a 9 hole golf course. By a letter dated 14 January 1994 (exh. A – p. 7), the plaintiff replied that it accepted the terms and conditions as stated in RZ2.

[5] The result of the aforesaid letters is the tenancy agreement entered into between the defendant and the plaintiff of on 5 July 1994 (exh. A5 pp. 8 -15).

[6] For convenience, I produce herein in full the RZ1, RZ2 (contained in PW1A) and the tenancy agreement – RZ4.

PETRA GOLF CENTRE

15B Jln Hj. Hashim Ja'apar, Lrg Pak Gani,
Petra Jaya 93050 Kuching, Sarawak
Tel:

29hb Julai 1993

Timbalan Pengerusi Eksekutif
Perbadanan Stadium Negeri Sarawak
Petra Jaya
Kuching.

Tuan,

PER : Cadangan Untuk Meningkatkan Kemudahan Golf Driving Range Perbadanan Stadium Negeri Sarawak

Kami merujuk kepada surat tuan yang bertarikh 4hb March 1993, Rujukan tuan: PSNS/L/126(5)

2. Sehubungan dengan cadangan asal kami untuk membuat tiga (3) buah Green serta Tee-Box, kami mendapati bahawa kawasan yang ada sekarang boleh menampung sembilan (9) buah Green serta Tee-Box. Oleh yang demikian adalah lebih wajar sekiranya kawasan ini diguna sepenuhnya dengan penambahan enam (6) buah lagi Green dan Tee-Box selain daripada tiga (3) buah Green dan Tee-Box yang telah diluluskan oleh pihak tuan terlebih dahulu.

3. Dengan adanya sembilan (9) buah Green dan Tee-Box, kami bercadang untuk menggunakan kawasan ini sebagai 'Public Golf Course' yang pertama sekali di Sarawak bagi kemudahan orang awam.

4. Memandangkan perbelanjaan yang begitu besar untuk melaksanakan cadangan di atas yang akan dibiayai oleh Syarikat kami, maka kami memohon jasa baik pihak tuan untuk mempertimbangkan jangka masa penyewaan kawasan yang ada sekarang sekurang-kurangnya sepuluh (10) tahun.

5. Sekiranya cadangan kami ini dipersetujui oleh pihak tuan, kami akan mengemukakan pelan yang menunjukan kawasan Green dan Tee-Box untuk rujukan pihak tuan seterusnya.

Kami sungguh-sungguh berharap agar pihak tuan tidak keberatan untuk menimbangkan permohonan kami ini dan kerjasama pihak tuan dalam perkara ini amatlah kami hargai dan sanjungi.

Sekian, terima kasih.

Yang benar,

(AWG KEMARUDIN AWG MOHAMED)
Pengurus

PSNS/L/126(11) 12 Januari 1994

PGC Golf Management Sdn. Bhd.
Lot 202, Section II, KTLD
1st Floor, Jalan Kulas
93400 Kuching.

(U.P. Encik Razak Haji Suib)

Tuan,

Cadangan Untuk Membina '9 Hole Golf Course' Di Kompleks Sukan Perbadanan Stadium Negeri Sarawak

Surat pihak tuan kepada Timbalan Pengerusi Eksekutif kami bertarikh 29 Julai 1993 mengenai perkara tersebut di atas adalah dirujuk.

2. Sukacita dimaklumkan bahawa Lembaga Pengarah Perbadanan Stadium Negeri Sarawak telah meluluskan pemohonan tuan untuk membina '9 Hole Golf Course' seperti yang dicadangkan oleh pihak tuan. Tawaran ini diberikan mengikut syarat-syarat seperti berikut:

2.1. Kemudahan berikut juga dibina dan disediakan disamping membina '9 Hole Golf Course':

1.1. Sebuah Golf Driving Range

1.2. Pejabat/Restaurant/Stall Makan

1.3. Sebuah Kantin

1.4. Sebuah Bilik Rehat

1.5. Peralatan Golf untuk disewa

1.6. dan sebuah 'Children Playground'

dan harus siap dan berfungsi mulai pada 1 Jun 1994 yang akan datang.

2.2. Semua kos pembinaan dan penyelenggaraan 'Golf Course' ini adalah tanggungan PGC Golf Management Sdn. Bhd. sendiri.

2.3. Perbadanan Stadium Negeri Sarawak bersetuju untuk menyewa kawasan tanah tersebut kepada PGC Golf Managemant Sdn. Bhd. selama tujuh (7) tahun mulai pada 1 Jun 1994 dengan kadar sewa sebanyak RM3000.00 sebulan dan hendaklah dibayar sebelum atau pada 15 haribulan pada setiap bulan. Namun begitu pihak tuan diberi opsan tiga (3) tahun selepas tempoh tamat untuk meneruskan Operasi Golf Course tersebut.

2.4. Pengurusan 'Golf Course' ini mesti dikendali sendiri oleh PGC Management Sdn. Bhd. Syarikat tuan tidak dibenar menjual saham kepada sesiapa pun melainkan mendapat kebenaran daripada Perbadanan Stadium Negeri Sarawak.

2.5. Segala pembinaan yang dimaksudkan di (2.1.) adalah kepunyaan Perbadanan Stadium Negeri Sarawak selesai sahaja kontrek diantara kedua-dua pihak tamat.

2.6. PGC Golf Management Sdn. Bhd. juga tidak dibenarkan untuk menyerahkan Operasi/Pengurusan Golf Course ini kepada pihak lain tanpa mendapat kebenaran daripada Perbadanan Stadium Negeri Sarawak.

2.7. Perbadanan Stadium Negeri Sarawak dan PGC Golf Management Sdn. Bhd akan menandatangani Surat Perjanjian yang diuruskan oleh Peguambela yang dilantik oleh Perbadanan Stadium Negeri Sarawak dan segala kos yang terlibat adalah tanggungan PGC Golf Management Sdn. Bhd. Surat Perjanjian ini akan diurus dalam tempoh tidak melebihi 14 hari dari tarikh surat ini.

3. Sekiranya pihak tuan bersetuju dengan syarat-syarat seperti yang tersebut di atas, sila akui penerimaan tawaran ini dan kembalikan kepada kami dalam tempoh 14 hari dari tarikh surat ini.

Sekian, terima kasih

"BERSATU BERUSAHA BERBAKTI"

Yang benar

(ABANG ZAINUDDIN BIN ABANG ABDUL RAHMAN)
Pengurus
Perbadanan Stadium Negeri Sarawak.

s.k. Timbalan Pengerusi Eksekutif
Perbadanan Stadium Negeri Sarawak.

AGREEMENT

AN AGREEMENT made this 5th day of July 1994 BETWEEN SARAWAK STADIUM CORPORATION a body corporate established by the Sarawak Stadium Corporation Ordinance 1972 and having an office at Jalan Stadium, Petra Jaya, 93050 Kuching, Sarawak (hereinafter referred to as "the Landlord") of the one part AND PGC GOLF MANAGEMENT SDN. BHD. a company registered under the Companies Act 1965 and having a place of business at Jalan Stadium, Petra Jaya, 93050 Kuching Sarawak (hereinafter referred to as "the Tenant") of the other part.

WHEREAS the Landlord has beneficial rights to occupy State Land situate at Siol Batu, Kuching, Sarawak containing area of 11,347 hectares, more or less, comprising of and described as Lots 1598 and 2593 Block 18 Salak Land District (hereinafter referred to as "the said land")

AND WHEREAS the Tenant is in the business of designing developing constructing operating and maintaining golf courses and providing all amenities facilities services and conveniences connected or incidental thereto.

AND WHEREAS the Landlord is desirous of letting and the Tenant is desirous of hiring the said land as shown shaded yellow on the attached plan marked "Appendix I" hereto for the purpose of constructing operating and maintaining a public golf course subject to the terms and conditions hereinafter appearing.

NOW IT IS WITNESSETH as follow:

(1) The Landlord will let and the Tenant will hire the said land for a period of seven (7) years from the 1st day of June 1994 and expiring on the 31st day of May of 2001, both dates inclusive.

(2) The monthly rental of the said land shall be Ringgit Malaysia Three Thousand Only (RM3,000.00) and the same shall be payable in advance on or before the 15th day of each calendar month.

(3) The Tenant hereby covenants with the Landlord as follows:

(a) To pay the reserved rent on the day and in the manner aforesaid.

(b) To design provide develop and/or construct at its own costs and expenses a nine (9) hole public golf course (hereinafter referred to as "the said golf course") which said golf course shall also include the following:

(i) a multiple-lane golf driving range,

(ii) a clubhouse comprising of an office, food & beverage outlet(s), toilets/changing rooms, common area(s) and a pro-shop providing sales service and rental of golfing equipment, and

(iii) a children's playground

SUBJECT TO the design plans and specifications of the said golf course being submitted to and approved by the Landlord and/or the planning authority in Sarawak.

(c) To operate and maintain the said golf course at a satisfactory standard.

(d) To comply with all relevant statutory provision, ordinance, by-laws, rules and regulations in force in Sarawak, Malaysia in relation to the development construction and operation of the said golf course.

(e) To insure the said golf course against all risk of loss and damage as a result of but not limited to fire.

(f) To implement and enforce reasonable and necessary rules regulations and codes of conduct in the said golf course.

(g) To be solely responsible for all loss and damage howsoever caused by itself its servants or agents to member visitors guests or invitees at the said golf course and to indemnify keep indemnified and save harmless the Landlord from any claim or liability for loss and/or damage so caused or arising as aforesaid.

(h) At the expiration or sooner determination of the term hereby created to peacefully and quietly surrender and deliver up the said land to the Landlord.

(i) To erect and maintain protective barriers and fencing around the said golf course and otherwise to be solely responsible for any loss and/or damage so caused, either by itself its servant or agent or any person lawfully on the said golf course as a result of any nuisance or encroachment outside the perimeter of the said golf course to third parties around the vicinity of the said land during the currency of the term hereby created and the Tenant shall indemnify and keep the Landlord indemnified against any losses and/or damages so caused or resulted as aforesaid.

(j) Not to pledge the credit of the Landlord in ordering or purchasing any goods and services.

(k) Not to assign underlet or part with the rights and/or benefits under this Agreement or any part thereof without first obtaining the prior written consent of the Landlord, such consent not to be unreasonably withheld.

(l) Not to use the said Land for any illegal or immoral purpose or for any other purposes other that as a public golf course.

(m) To pay for electricity and water consumed on the said land.

(n) Not to alter its shareholding, deal with or dispose of its shares as at the date of execution of this Agreement without the prior written approval of the Landlord during the term created herein.

(o) To observe and comply with all notices served in respect of the said land and rules of the relevant competent authorities.

(p) To permit the Landlord their servants or agents to enter upon the said land at all reasonable times for the purpose of viewing the condition thereof.

(4) The Landlord hereby covenants with the Tenants as follows:

(a) To protect maintain and safeguard for the duration of the term herein created its right to occupy the said land and to pay such dues levies or rents in respect of the said land, if any.

(b) To obtain the supply of water and electricity for the said land.

(c) That the Tenant paying the rent reserved and performing all the covenants herein contained shall peacefully and quietly hold and enjoy the said land for the term herein created without any interruption by the Landlord or anyone claiming through or under them.

(5) If the monthly rent and or any part thereof shall be and remain unpaid for Fourteen (14) days after becoming payable whether demanded or if any of the covenants of the Tenant's part herein contained shall not be observed or performed, the Landlord shall be at liberty to terminate this Agreement after giving three (3) month's written notice to the Tenant in which event, the Tenant shall yield up vacant possession of the said land to the Landlord forthwith.

A BUT WITHOUT PREJUDICE to the right of the Landlord to commence legal action in respect of any antecedent breach of the Tenant's covenants herein contained.

(6) Notwitstanding the said term of seven (7) years herein created, the Landlord shall grant the Tenant the first option B to extend this Agreement for a further term of three (3) years (hereinafter referred to as "the extended term") subject to the same terms and conditions provided that the Tenant shall give the Landlord at least one (1) month's written notice of their desire to exercise the said option.

C (7) Either party hereto may opt to terminate this Agreement by giving the other party at least six (6) month's written notice to such effect PROVIDED ALWAYS that if the Landlord shall exercise their right to terminate this Agreement before the expire of the terms herein created, the Landlord shall D compensate the Tenant for the capital expenditure and outlay in respect of the said golf course for the unused period in proportion to the whole of the term herein created AND PROVIDED ALWAYS that the quantum of the compensation shall be on the basis of independent professional survey and valuation.

E (8) No delay on the part of the Landlord in the exercise of any of its rights under this Agreement or failure to exercise or assert the same shall be deemed to constitute a waiver of such rights.

F (9) Any notice required to be served by the parties hereto onto each other shall be in writing and shall be sent by A.R. Registered mail to their respective addresses as stated hereinabove.

G (10) (a) All references to words in the singular shall include the plural and *vice versa*; and

(b) All references to "the Landlord" and the "Tenant" shall include their legal and/or equitable successors-in-title, assigns and receivers.

H (11) This Agreement shall be binding on the legal and/or equitable successor-in-title, assigns and/or receivers of both the parties hereto.

I

(12) The costs, fees, expenses and disbursements for the preparation and stamping of this Agreement shall be borne by the parties hereto equally.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seal the day and year first above written.

The Common Seal of] SARAWAK STADIUM] CORPORATION] (the Landlord)] was by the authority of] a resolution of the] Member of the Corporation] is hereunto affixed in the] presence of:]	... Deputy Chairman ... Member
The Common Seal of PGC] GOLF MANAGEMENT] SDN. BHD. (the Tenant)] was by the authority of a] resolution of the Board of] Directors thereof hereunto] affixed in the presence of:]	... Director ... Director/Secretary

Instrument prepared by Messrs Hamzah & Ong Advocates, No 13, 1st Floor, Jalan P. Ramlee, 93400 Kuching
(Ref: C/SSC/5/94)

[7] On or about September 1997, the plaintiff had defaulted in its payment of rental for a number of months. As a result of the default, the defendant on 15 September 1997 issued a letter informing the plaintiff that it is in arrears of four months rental amounting to RM19,128.40 and gave the plaintiff a three month written notice to deliver vacant possession of the said land to the defendant pursuant to cl. 5 of the tenancy agreement.

[8] By a letter dated 1 October 1997, the plaintiff informed the defendant that it would return the land after it had cleaned and emptied the buildings thereon which were erected by it. By another letter dated 15 October 1997, the plaintiff informed the defendant that it was waiting for interested parties to submit proposals for the acquisition of the plaintiff, but if no proposal was acceptable to the plaintiff by the end of October 1997, the plaintiff intended to cease operations of Petra Golf Course with effect from 31 October 1997.

[9] The plaintiff ceased operations and vacated the said land on 31 October 1997. On 1 November 1997 the defendant took possession of the land.

Issues

[10] In my view, the pivotal issue is the construction of cl. 5 of the tenancy agreement which states as follows:

> If the monthly rent and or any part thereof shall be and remain unpaid for Fourteen (14) days after becoming payable whether demanded or if any of the covenants of the Tenant's part herein contained shall not observed or performed, the Landlord shall be at liberty to terminate this Agreement after giving three (3) months written notice to the Tenant in which event, the Tenant shall yield up vacant possession of the said land to the Landlord forthwith.
>
> BUT WITHOUT PREJUDICE to the right of the Landlord to commence legal action in respect of any antecedent breach of the Tenant's covenants herein contained.

[11] The plaintiff's case is simply that despite the fact that the tenancy agreement was terminated pursuant cl. 5, it still had the right to remove the trade fixtures as stated in cl. 5 of the statement of claim which are as follows:

a. Tee Box

b. Greens

c. Fairways 5

d. Administration Block

e. Rest hall

f. Driving Range Shed

[12] Mr. Mohd. Ivan bin Hussein (Hussein), learned counsel for the plaintiff, concedes that there is no specific provision in the tenancy agreement to allow the plaintiff to remove the aforesaid fixtures if the tenancy agreement is terminated pursuant to cl. 5. He however submits and urges the court to look at the surrounding circumstances in which the tenancy agreement was entered into to ascertain the true intentions of the parties. By surrounding circumstances, Mr. Hussein refers to the length of the tenancy, the capital investment injected by the plaintiff and the

negotiations conducted by the plaintiff and the defendant evidenced in RZ1 and RZ2. Further he urges the court to utilize the principle of equity to imply that there is a tenancy coupled with an interest. In short he says that to interpret cl. 5 of the tenancy agreement to mean that the plaintiff had no right to remove the fixtures would be manifestly unfair in the circumstances. Put in another way he is asking me to imply a term in the tenancy agreement to allow the plaintiff to remove the fixtures.

[13] With respect, Mr. Hussein has in his submission completely departed from the plaintiff's pleadings which grounded its claim on the breach of the tenancy agreement by the plaintiff of cls. 5 and 9 of the same. (See Clement Skinner J's ruling on 23 September 2004 in this case on plaintiff's application to amend its pleadings).

[14] However before I deal with the consequence of Mr. Hussein's departure from the pleadings, I shall deal with the alleged breach of cls. 5 and 9 of the tenancy agreement. In so far as the alleged breach of cl. 9 it is inconsequential as there is no dispute that the plaintiff had received the letter dated 15 September 1997 as this fact is part of the parties' agreed facts. As for the breach of cl. 5, it is again of no relevance as it was the plaintiff itself who ceased operations and vacated the said land on 31 October 1997. The allegation that the plaintiff was prevented from removing the fixtures is again irrelevant as its right to remove the fixtures depends on the interpretation of the tenancy agreement. In any event I agree with Mr. Tan Thiam Teck, learned counsel for the defendant, that the plaintiff had not suffered any damages as a result of the defendant taking possession of the land.

[15] I come back to Mr. Hussein's departure from the pleadings in his submission. It is trite law that parties are bound by their pleadings and courts will not decide on matters which had not been pleaded. What has not been pleaded here is that there is an implied term in the tenancy agreement that the plaintiff is entitled to remove the fixtures when the tenancy agreement is terminated under cl. 5. This is in fact the second time the plaintiff is attempting to amend its pleadings. When the trial for this case started on 22 September 2004 in court 1, the plaintiff wanted to include the element of malicious intention on the part of the defendant. That attempt was rejected by Clement Skinner J on the grounds that the plaintiff's amendment was a complete departure

from the pleaded case and not made in good faith. The learned judge's decision was affirmed by the Court of Appeal. For the same reasons, I also find the plaintiff's attempt to say that the tenancy agreement is a lease coupled with an interest to be improper.

[16] Be that as it may, I will deal with Mr. Hussein's submission. The law is that the court will only imply a term when the parties must have intended to include though it has not been expressly set out in the agreement. Is this the case here? In interpreting any contract, the court must look at the words used within the four corners of the agreement to ascertain the intentions of the parties and must interpret the clause in the context of the whole agreement. In this case, if one looks at the tenancy agreement as a whole, one can easily ascertained that the parties had thought about the inequity of a situation if the tenancy agreement were terminated prior to the expiration of the seven years period in view of the heavy investment by the plaintiff. That is the reason for cl. 7 of the tenancy agreement which provides that:

> Either party herein may opt to terminate this Agreement by giving the other party at least six (6) month's written notice to such effect PROVIDED ALWAYS that if the Landlord shall exercise their right to terminate this Agreement before the expire of the term herein created, the Landlord shall compensate the Tenant for the capital expenditure and outlay in respect of the said golf course for the unused period in proportion to the whole of the term herein created AND PROVIDED ALWAYS that the quantum of the compensation shall be on the basis of independent professional survey and valuation.

[17] Where however if the plaintiff/tenant fails to comply with the terms of the tenancy agreement by failing to pay the rentals, cl. 5 provides that the defendant can terminate it and upon termination the plaintiff is obliged to return the land forthwith. No compensation is payable to the plaintiff simply because it is in default. As rightly pointed out by Mr. Tan Thiam Teck the plaintiff can continue to enjoy the benefit of its investment in the land as long as it pays the agreed rental.

[18] Furthermore, this tenancy agreement was drawn up by a firm of solicitors, whom would have been given all the relevant instructions by both the plaintiff and the defendant (there are no evidences to the contrary). It would have been very easy for the firm of solicitors to draft the relevant words to reflect the Mr. Hussein's contention as they had done for cl. 7 of the tenancy agreement.

[19] As for the submission by Mr. Hussein that not to imply a term as suggested will be unduly harsh to the plaintiff, I can do no better than refer to the case of *Mulpha Pacific Sdn. Bhd. v. Paramount Corp Sdn. Bhd.* [2003] 4 CLJ 294 where the Court of Appeal at p. 301 states as follows:

> In *The Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995, Lim Beng Choon J said:
>
> > In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v. Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p. 560: The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.
>
> In *Central Bank of India v. Hartford Fire Insurance Co Ltd.* AIR [1965] SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p. 1290:
>
> > Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention

A correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

B The intention of the parties must be ascertained from the words used in the agreement. Whichever way we look at cl. 4.2 of the agreement, we are of the view that the respondent would be entitled to claim interest for the additional month plus 3 days even if the appellant had not breached the agreement and had completed the transaction. Our sympathies are with the appellant. C The RM9 million which they paid as deposit have been forfeited and, in addition to that, they have been ordered to pay interest amounting to the sum of RM776,712.33 together with interest from 21 November 1997 to date of payment. But then, the court must give effect to the plain meaning of the words of cl. 4.2 of the agreement however much it may dislike the result.

D

[20] (See also the case of *Setapak Heights Development Sdn. Bhd. v. Tekno Kota Sdn. Bhd.* [2006] 2 CLJ 337).

[21] There is of course no allegation by PW1 stating that the E tenancy agreement was an unfair or unconscionable one. In any event for equity to intervene in an unconscionable agreement, the plaintiff must prove that there is an inequality of bargaining powers between it and the defendant. In the Australia High Court's decision in *Commercial Bank of Australia v. Amadio* [1983] 151 F CLR 447, Deane J described the jurisdiction of the courts of equity to relieve against unconscionable dealings is long established, and generally extends to:

(i) a party to a transaction was under a special disability in dealing with the other party with the consequence that was G an absence of any reasonable degree of equality between them and

(ii) that disability was sufficiently evident to the stronger party to make it *prima facie* unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the H impugned transactions in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast on the stronger party to show that the transaction was fair, just and reasonable.

I

[22] Not only is there no evidences on the element of inequality in bargaining powers between the parties, PW1 comes across from his testimony in court as a person who is well versed with the intricacy of the business dealings and not one likely to be misled or bullied by anyone.

[23] As for the case of *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1999] 6 CLJ 487, relied by Mr. Hussein, I agree with Mr. Tan Thiam Teck that the facts in that case are different to the present case in that there was no encouragement by the defendant to expend money into the golf course. The tenancy agreement was entered into by the parties here after extensive negotiations.

[24] Lastly on this issue, reliance was made on para. 2.5 of RZ2 which states as follows:

> Segala Pembinaan yang dimaksudkan di (2.1) adalah kepunyaan Perttabanan Stadium Negeri Sarawak selesai sahaja kontrek diantara kedua-dua pihak tamat.
>
> All constructions as stated at (2.1) shall be owned by the State Stadium upon the expiry of the contract between the two parties. (English translation)

[25] The plaintiff contends that the word 'tamat' refers only to the expiration of the seven years and not to termination of the tenancy agreement. With respect, this paragraph does not help the plaintiff as RZ2 contains only the general intentions of the parties and provides the basis for the drafting of tenancy agreement. Once the tenancy agreement is drafted and executed by the parties, the court is only entitled to look at the words employed in it. Mr. Hussein also relies RZ13 exhibited in PW1A, which in my judgment had been adequately dealt with by Mr. Tan Thiam Teck at p. 12 of his written reply (encl. 140).

[26] I shall now deal with the defendant's counterclaim of RM23,081.06 being outstanding rentals for part of month of October 1996, the months of November, December 1996 and June, July, August, September and October 1997 and water consumed by the plaintiff which had been paid by the defendant. From the evidences there appears to be no real challenge by the plaintiff on its liability for those outstanding rentals and the water bill of RM952.66. The proof of the amount of RM23,081.06 is contained in DW4A, which in my view had not been shaken by cross examination.

[27] Accordingly for reasons given above, the plaintiff's claim is hereby dismissed with costs to be taxed unless agreed to the defendant.

[28] In respect of the defendant's counterclaim I enter judgment for the defendant in the sum of RM23,081.06 with interest under s. 11 of the Civil Law Act thereon at the rate of 4% from the date of the counterclaim to the date of judgment and thereafter statutory interest at the rate of 8% from the date of judgment until the date of full payment by the plaintiff and costs to be taxed unless agreed to the defendant.

Date (of the delivery of judgment): 26 June 2006 (Monday).